Supreme Court, U.S.
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No. 98-1414

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DIANE ALICE SCHWARTZ,

Petitioner,

vs.

JOSEPH S. GREGORI, M.D. and
JOSEPH S. GREGORI, M.D., INC., Individually and as
Trustee and Administrator of Pension Plan and Trust,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Joseph S. Gregori, M.D., Inc., is a professional corporation and has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

This action was initially filed by Diane A. Schwartz (hereinafter "Schwartz"), in the United States District Court for the Northern District of Ohio on November 10, 1988, seeking damages for alleged violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* (hereinafter "ERISA").

This matter was tried to Judge Frank J. Battisti from May 6, 1992 through May 11, 1992 in Youngstown, Ohio. The District Court entered Judgment in this case on July 31, 1993, as follows:

> Against all Defendants jointly and severally on the breach of fiduciary duty claim for the loss suffered by the Plan in the amount of $19,728.15, for prejudgment interest on that loss in the amount of $10,077.00, and attorneys' fees, and against Gregori on the 29 U.S.C. § 1140 wrongful discharge claim for back pay in the amount of $59,764.00 and front pay in the amount of $42,443.00.

Joseph S. Gregori, M.D. and Joseph S. Gregori, M.D., Inc. (hereinafter "Gregori") appealed from the judgment of the District Court, and Schwartz filed a cross-appeal. On January 31, 1995, this Court of Appeals affirmed the judgment of the District Court. On February 14, 1995, Gregori filed a Petition for Rehearing and Suggestion for Rehearing En Banc pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rule 14 of the Rules of Appellate Procedure for the Sixth Circuit Court of Appeals. That Motion was denied on March 17, 1995.

Gregori sought further review by this Court by filing a Petition for Writ of Certiorari. Schwartz filed a Memorandum in Opposition to Gregori's Petition and Gregori then filed a Reply Brief. The United States Supreme Court denied Gregori's Petition for Certiorari on October 2, 1995.

Though the District Court's initial July 31, 1993 Order awarded Schwartz attorneys' fees for the District Court portion of these proceedings, the Order did not fix an amount. On November 12, 1993, the District Court entered an Order awarding Schwartz attorneys' fees in the in the amount of $33,253.50 and costs in the amount of $3,296.07 in connection with the Court's earlier Order.

All of the damages referenced above and arising out of the District Court's July 31, 1993, and November 12, 1993, Orders have been paid in full. This appeal relates solely to a number of additional attorneys' fee petitions filed by Schwartz for attorneys' fees incurred in connection with Gregori's appeal to the Sixth Circuit and Petition for Writ of Certiorari.

The first portion of Schwartz's additional request was for $43,365.05 in attorneys fees and $2,597.80 in costs related to the work done by the law firm of Nadler, Nadler & Burdman Co., L.P.A. with respect to the appeal and cross-appeal to the Sixth Circuit Court of Appeals.

The second portion of Schwartz's additional request was for $38,587.50 in attorney's fees and $1,170 in costs related to the work done by Plaintiff's husband, Attorney Richard Schwartz, in connection with Schwartz's response to Gregori's Petition for Writ of Certiorari to the United States Supreme Court.

Both Nadler, Nadler & Burdman Co., L.P.A. and Richard Schwartz filed supplemental attorneys' fees petitions seeking fees associated with their attempts to collect the attorneys' fees related to the appellate aspects of this case.

A hearing on the pending attorneys' fee petitions was held before Magistrate Judge James D. Thomas on September 25, 1996. Magistrate Judge Thomas filed a Report and Recommendation on July 23, 1997, suggesting that the attorneys' fee petitions be granted in part and denied in part. The Magistrate's Decision suggested awarding attorneys' fees as follows: (1) $47,308.05 in fees and $3,862.34 in costs to the law firm of Nadler, Nadler & Burdman Co., L.P.A. for the work before the Sixth Circuit; and (2) $10,500 in attorney's fees and $1,240 in costs to Richard Schwartz for the work done before the United States Supreme Court.

Both Schwartz and Gregori filed Objections to Magistrate Judge Thomas's Report and Recommendation. On September 26, 1997, Judge Peter C. Economus granted Gregori's Objections, rejected Magistrate Judge Thomas's Report and Recommendation, and denied the pending attorneys' fee petitions.

Schwartz filed an Appeal with the Sixth Circuit Court of Appeals relative the District Court's denial of her requests for additional attorneys' fees. The Sixth Circuit reviewed the District Court's denial of appellate attorneys' fees for an abuse of discretion.

The principle issue before the Sixth Circuit was whether the five-part test adopted by the Circuit for analyzing requests for attorneys' fees in ERISA litigation should be applied to the defendants' underlying conduct which gave rise to the

litigation or to the merits of the appeal. The Sixth Circuit concurred with the District Court and decided that the analysis is to be applied to the merits of the appeal.

The Sixth Circuit concluded that although Gregori's arguments on appeal were ultimately rejected, they raised significant issues of first impression not only in the Sixth Circuit, but with respect to any federal Court of Appeals. Gregori's appellate arguments were based on a good faith and rational interpretation of existing federal law.

On November 20, 1998, the Sixth Circuit affirmed the District Court's denial of Schwartz's requests for additional attorneys' fees. The Sixth Circuit denied a Motion for Rehearing and Suggestion for Rehearing En Banc on December 23, 1998. Schwartz timely filed a Petition for Writ of Certiorari with this Court on March 4, 1999.

REASONS FOR DENYING THE WRIT

I.

THE STANDARD APPLIED BY THE SIXTH CIRCUIT IN ANALYZING SCHWARTZ'S REQUESTS FOR APPELLATE ATTORNEYS' FEES IS NOT IN CONFLICT WITH THE STANDARD APPLIED BY THE THIRD CIRCUIT.

ERISA contemplates for awards of attorneys fees in 29 U.S.C. § 1132(g)(1), which provides as follows:

> (1) In any action under this title . . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

In analyzing whether Gregori should pay the attorneys' fees incurred by Schwartz in the earlier appeal, the Sixth Circuit considered the following five factors:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

Schwartz v. Gregori, 160 F.3d 1116, 1117 (6th Cir. 1998) *citing Secretary of Dep't of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985).

Schwartz contends that the Sixth Circuit's application of this test to the case at bar is in direct conflict with the Third Circuit's decision in *McPherson v. Employees' Pension Plan of American Re-Insurance Company, Inc.*, 33 F.3d 253 (3rd Cir. 1994), which set forth the five factors to be considered in a request for attorneys' fees under ERISA as follows:

(1) the offending parties' culpability or bad faith;

(2) the ability of the offending parties to satisfy an award of attorneys' fees;

(3) the deterrent effect of an award of attorneys' fees against the offending parties;

(4) the benefit conferred on members of the pension plan as a whole; and

(5) the relative merits of the parties' positions.

McPherson, 33 F.3d at 254. Clearly, the five factors as expressed by the Sixth and Third Circuits are virtually identical.

The crux of what Schwartz identifies as a "direct conflict" between the Sixth and Third Circuits is *McPherson*'s recognition that bad faith and culpability are not necessarily synonymous. Specifically, the Third Circuit recognized that an award of attorneys' fees may be appropriate even when the Court does not find that the party acted with "an ulterior motive or sinister purpose," as would be required under a purely bad faith standard. *McPherson*, 33 F.3d at 256-257.

In both her Brief to the Sixth Circuit and her Petition for Writ of Certiorari, Schwartz argues that the District Court and Sixth Circuit failed to consider Gregori's culpability with respect to the underlying conduct which gave rise to the lawsuit. It is this purported failure to consider Gregori's alleged culpability which gives rise to what Schwartz characterizes as a conflict with *McPherson*.

Schwartz, however, fails to acknowledge the underlying factual distinction which separates these cases: *McPherson* dealt with attorneys' fees at the trial court level, while this case analyzes a request for attorneys' fees incurred during the appellate phase of the case. Both the District Court and the Sixth Circuit rejected the argument that Gregori's underlying conduct, which formed the factual basis for Ms. Schwartz's claims at trial, should be considered in

determining whether culpability or bad faith was present in the appellate portion of the case. Rather, the Sixth Circuit looked to the basis for the appeal:

> Ms. Schwartz argues that, in determining the degree of the opposing party's culpability or bad faith, courts must examine the bad faith or culpability of the Gregori defendants in the underlying lawsuit; whereas, the appellees maintain that, because Schwartz seeks appellate fees and costs, courts should review whether the Gregori defendants pursued their appeal in bad faith. Logic dictates the answer to this question; where an appellee seeks attorney's fee and costs for services performed in connection with defending an appeal, we review whether the appellant pursued this appeal in bad faith and not whether the appellant's conduct which resulted in litigation warrants a finding of bad faith or culpability.

Schwartz, 160 F.3d at 1119-1120. *McPherson* dealt with attorneys' fees before the District Court. Therefore, the *McPherson* Court never spoke to the standard which should be applied to an award of appellate attorneys' fees. Accordingly, *McPherson* is not in conflict with the Sixth Circuit's decision in this case.

It should also be noted by this Court, that the standard announced by the Sixth Circuit with respect to appellate attorneys' fees is consistent with the other Circuit's which have addressed the issue. *See DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 414 (9th Cir. 1994) (attorneys' fees not awarded for appellate work because "[a]ppellants' claims

were neither frivolous nor made in bad faith, and were supported by existing out-of-circuit law or good faith arguments to extend, modify or reverse the law of this Circuit."); and *Nachwater v. Christie*, 805 F.2d 956, 962 (11th Cir. 1986) (attorneys' fees for appellate work not awarded because defendant-appellant's "claim was neither frivolous nor pursued in bad faith.").

The fact that Gregori did not prevail with respect to his arguments does not equate to his arguments being made in bad faith. The Sixth Circuit recognized that Gregori presented novel, good faith arguments with respect to an issue of first impression:

> . . . [T]he Gregori defendants pursued an issue which had to be newly addressed by this Circuit. In addition, . . . the question of whether front pay and back pay were permissible relief for ERISA violations . . . was not answered by any other circuit. For these reasons, the District Court was entitled to conclude that the defendants' appeal to our Court and its petition for writ of certiorari were not pursued in bad faith.

Schwartz, 160 F.3d 1120. Even the Court in *McPherson* held that "a party is not culpable merely because it has taken a position that did not prevail in litigation." *McPherson*, 33 F.3d at 257.

Schwartz, in her Petition for Writ of Certiorari, also attacks the Sixth Circuit for only addressing Gregori's appellate arguments regarding the back pay and front pay issue. The Sixth Circuit did this, however, because it was the only issue Schwartz had addressed:

> While the Gregori defendants raised . . . other issues on appeal, neither party has argued that the issues ought to be considered individually and attorney's fees awarded only for those issues satisfying the *King* factors.

Gregori, F.3d at 1120, n.6.

There is no conflict between the Third and Sixth Circuits on this issue. Accordingly, pursuant to S. Ct. Rule 10, Schwartz's Petition for Writ of Certiorari should be denied.

II.

THE SIXTH CIRCUIT'S APPLICATION OF THE STANDARD OF REVIEW TO THE DISTRICT COURT'S RULING ON THE ATTORNEYS' FEE ISSUE IS NOT IN CONFLICT WITH THE STANDARD APPLIED BY THE THIRD AND NINTH CIRCUITS.

Schwartz next argues that the Sixth Circuit applied an incorrect legal standard when it reviewed the District Court's denial of attorneys' fees for an abuse of discretion. Schwartz mischaracterizes several decisions from the Third and Ninth Circuits as requiring a plenary standard of review.

The Sixth Circuit stated that "the decision of a district court to award attorney's fees under 29 U.S.C. § 1132(g)(1) will stand absent an abuse of discretion." *Schwartz*, 160 F.3d at 1118. This standard of review is dictated largely by the language of 29 U.S.C. § 1132(g)(1), which provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

Schwartz first points to *McPherson* for the proposition that the Sixth Circuit should have applied a plenary standard of review. *McPherson*, however, specifically provides for an abuse of discretion standard:

> An award of . . . attorney's fees to a prevailing plaintiff in an ERISA case is within the discretion of the district court and may only be reversed for abuse of discretion.

McPherson, 33 F.3d at 256 *quoting Schake v. Colt Indus. Operating Corp. Severance Plan*, 960 F.2d 1187, 1190 (3rd Cir. 1992).

Schwartz next cites *Ellison v. Shenango Incorporated Pension Board*, 956 F.2d 1268 (3rd Cir. 1992) for the proposition that a plenary standard of review is appropriate. *Ellison* also, however, calls for an abuse of discretion standard:

> Under section 502(g)(1) we review a district court's award or denial of attorney's fees for abuse of discretion.

Ellison, 956 F.2d at 1273.

Both *Ellison* and *McPherson* did, however, hold that the appellate court should undertake a plenary review of whether the district court applied the correct legal standard. *Ellison*, 956 F.2d at 1273; *McPherson*, 33 F.3d at 256. The Sixth Circuit's decision in the case at bar does not conflict with these holdings. Rather, the Sixth Circuit determined that the District Court had used the correct legal standard and analyzed the District Court's exercise of its discretion under such standard.

Schwartz also cites *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984) as being in conflict with the Sixth Circuit's decision in the case at bar. The Ninth Circuit in *Smith* cited the standard of review in cases of this nature as follows:

> A decision denying fees will be set aside if the district court (1) abused its discretion, . . . (2) failed to state the reasons for its decision, . . . or (3) used incorrect legal standards to reach its decision.

Smith, 746 F.2d at 589. Nothing in *Smith* is inconsistent with the Sixth Circuit's holding in the instant case.

In fact, the Sixth Circuit's analysis of whether the five-factor *King* test should be applied to the underlying conduct which gave rise to the lawsuit or the arguments raised on appeal, amounts to a plenary review. The Sixth Circuit undertook an independent investigation of the conflicting arguments of Schwartz and Gregori, and concluded that the District Court had applied the correct legal standard. The Sixth Circuit then reviewed the lower court's reasoning in order to determine whether the District Court had abused its discretion in denying Schwartz's requests for additional appellate attorneys' fees.

The process utilized by the Sixth Circuit is completely in accordance with the standards of review outlined by the Third and Ninth Circuits' decisions in *Smith*, *Ellison* and *McPherson*. Since no conflict exists with respect to this issue, Schwartz's Petition for Writ of Certiorari should be denied pursuant to S. Ct. Rule 10.

III.

THE SIXTH CIRCUIT'S DECISION DENYING SCHWARTZ'S REQUEST FOR APPELLATE ATTORNEYS' FEES DOES NOT DEFEAT THE REMEDIAL PURPOSE OF ERISA.

In her Petition for Writ of Certiorari, Schwartz repeatedly refers to the supposed inequities associated with the lower courts' failure to award her attorneys' fees despite the fact she was the prevailing party. Schwartz contends that this will work as a deterrent against similarly situated Plaintiffs pursuing ERISA claims and defeats the remedial purpose of ERISA.

The statute, however, merely provides that a court *may, in its discretion* issue an award of attorneys' fees to the prevailing party. 29 U.S.C. § 1132(g)(1). This provision clearly contemplates that there will be situations where parties, although they ultimately prevail, are not entitled to an award of attorneys' fees. This is such a case.

Schwartz fails to recognize the inequities that would arise if a party who does not prevail at the trial level must pay the attorneys' fees of the prevailing party throughout the appellate phase of the proceedings where, as here, there are important legal issues which should be addressed by the appellate court.

The legislature could have formulated 29 U.S.C. § 1132(g)(1) to contain a "loser pays" provision, but chose not to. Congress left the decision as to the appropriateness of attorneys' fees to the individual courts to decide on a case by case basis. The Sixth Circuit thereafter adopted the five-part test set forth in *King* to assist the District Courts in examining requests for attorneys' fees.

The District Court looked at all five factors, and decided that they all weighed in favor Gregori. The Sixth Circuit reviewed the District Court's analysis and found no error. This Court has declared that it is not the purpose of the Supreme Court to substitute its judgment for that of lower courts in discretionary matters. S. Ct. Rule 10 states as much in setting forth the considerations governing this Court's review of a Petition for Writ of Certiorari:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

As demonstrated above, the District Court and Sixth Circuit properly stated the five factors to be considered in ruling on a request for attorneys's fees in a ERISA case. Accordingly, this Court's analysis need go no further and Schwartz's Petition for Writ of Certiorari should be denied.

IV.

THE OTHER REASONS FOR GRANTING THE WRIT CITED BY SCHWARTZ IN HER PETITION DO NOT MERIT A GRANT OF CERTIORARI.

Schwartz raises three additional arguments in the final section of her Petition for Writ of Certiorari, arguing that: (1) the District Court's factual finding with respect to Gregori's ability to satisfy a judgment was erroneous; (2) the District Court's and Sixth Circuit's determination that Schwartz did not file this lawsuit for the benefit of the plan as a whole was erroneous; and (3) caselaw relied on by the Sixth Circuit is distinguishable from the case at bar.

It is unnecessary to address these issues in any great detail, other than to point out that both the District Court and the Sixth Circuit were in accord in rejecting Schwartz's arguments relative to all three of these issues. Moreover, S. Ct. Rule 10 clearly provides that these three arguments are not grounds upon which this Court will grant Schwartz's Petition for Writ of Certiorari.

CONCLUSION

Joseph S. Gregori, M.D. and Joseph S. Gregori, M.D., Inc., for the foregoing reasons, respectfully request that the Supreme Court deny the Petition for Writ of Certiorari filed by Diane Schwartz in connection with this matter.

Respectfully submitted,

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